

Remarks

4. In points 2(a) and 2(b) above, applicant amended the text of the specification to add reference numbers, to conform the reference numbers with the drawings, and to conform the words convex and concave so that they accurately reflect what is shown in FIG. 5. Applicant does not believe any of these minor amendments add any new matter to the application and respectfully requests the Examiner enter these amendments to the specification. Also, applicant does not believe new claims 17-24 add new material to the application, because support for these claims is found in the specification.

5. Amended claims 1 and 9 now include the proper antecedent basis for the language "the juncture," as shown in the above "Marked Up" version of the claims. Applicant believes the 35 U.S.C. §112, second paragraph rejection of amended claims 1 and 9 has now been overcome. Applicant respectfully requests reconsideration of the rejection of amended claims 1 and 9, that the rejection of these claims be withdrawn, and that these claims be allowed.

6. Amended claims 2 and 10 have been amended to include the structural language suggested by the Examiner, in particular, the language "exposed depth of each side edge" has been added to these claims. Applicant respectfully requests the 35 U.S.C. §112, second paragraph, rejection of amended claims 2 and 10 be withdrawn and that these claims be allowed. In view of the amendments presented in points 5 and 6, applicant believes the 35 U.S.C. 112, second paragraph rejection to amended claims 2

and 10 has been overcome, and respectfully requests withdrawal of the rejections of these claims, and reconsideration of these claims, and that these claims be allowed. Hence, applicant respectfully requests that because amended claims 1, 2, 9, and 10 now appear to be in condition for allowance, claims 3-8 and 11-16 which depend therefrom are likewise in condition for allowance. Thus, applicant respectfully requests all the pending claims be allowed.

7. Response to Point 7(c) in the First Office Action.

Amended claims 1, 2, 9, 10 and the claims which dependent therefrom (4-8, 12-16) stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Pat. No. 6,286,284 to Cantley (hereinafter Cantley or the Cantley patent). In addition to the above amendments to amended claims 1-2, and 9-10, applicant traverses the Examiner's rejections of these claims on the grounds of obviousness. Independent amended claims 1 and 9 call for a large offset of "at least 50% to 95%" between the lattice extension members. However, in addition to the Cantley patent never teaching, showing, or suggesting this structure, the Cantley patent specifically and repeatedly teaches against this structure, as discussed below.

The Cantley patent shows a plastic lattice 50, and is: "designed to be generally two-dimensional, as shown in FIG. 7, while giving a three-dimensional appearance, as shown in FIG. 6." (Cantley, col. 3, lines 27-29.)

The Cantley lattice 50 has a first plurality of spaced apart, parallel continuous elongated members 52, all in the same plane. Each elongated member 52 has an upper surface 54, a lower surface 56, and edges 58. The lattice 50 also has a

second plurality of discontinuous elongated members 60 which intersect and interconnect with the continuous members 52. The discontinuous member 60 appear to reside below the continuous members 52. The discontinuous members 60 all reside in the common plane, are parallel to one another, and are spaced from one another, as stated in the Cantley patent:

"The continuous members 52 and discontinuous members 60 both lie in the same plane and are not offset three-dimensionally from one another." (col. 3, lines 54-57.)

The Examiner cites the Cantley patent as the basis for the rejecting amended claim 1 because Cantley merely states that the members "could be in separate planes that are offset from one another." (col. 3, lines 62-64.)

However, the Cantley patent then goes on to repeatedly teach against having the members of the lattice lie in offset planes, as such a configuration is undesirable, as shown by the following language found in the Cantley patent:

"Therefore, it would be difficult to injection mold a one-piece plastic lattice that exactly duplicated traditional wood lattice, because the areas where the first and second sets of slats overlap would be twice as thick as the portions where they did not overlap. This would lead to uneven cooling and difficulties with the flow of the liquid plastic." (Col. 2, lines 18-25.)

Then the Cantley patent discusses U.S. Design Patent No. D402,381 to Gruda, which shows a minimal offset to give a 3-D appearance for the fence, and the Cantley patent goes on to state the Gruda design:

"patent attempts to give a three-dimensional appearance without having areas that are twice as thick as others. To accomplish this, the first and second sets of plastic slats intersect and overlap so that a majority of both the first and

second sets of slats are in the same plane. However, one set of slats is offset from the second set of slats so that it sits above the other set of slats. This creates a three-dimensional appearance even though the first and second sets of slats are not offset as much as traditional wooden slats. However, the overlapping junction areas are only somewhat thicker than the rest of the slats. One drawback to this design is that the thicker junction areas use additional plastic and cool slower when compared to two-dimensional plastic lattice, as discussed previously. Another drawback is that the offsets may hinder the flow of liquid plastic in the mold. Also, the approach disclosed in the Gruda patent creates a lattice that is thicker than two-dimensional plastic lattice. (col. 2, lines 27-44.)

Then, the detailed description of the Cantley patent states:

"Preferably, the continuous members 52 and discontinuous members 60 both lie in the same plane." (col. 3, lines 51-52.);

"and are not offset three-dimensionally from one another." (col. 3, lines 56-57.); and

"it is preferred that all the members lie in a common plane" (col. 3. lines 62-63.)

Indeed, Cantley shapes the continuous member 52 with concave surfaces 54 and 56 which serve to "visually distinguish" the upper surface 54 of the continuous member 52 from the upper surface 62 of the discontinuous member 60. This gives the "illusion of the lattice 50 being three-dimensional." (col. 4, line 62.) Again, the Cantley reference shows structure to create and "illusion" of three dimensions in order to avoid the problems Cantley had with overlapping lattices.

Thus, although Cantley states the member could be in separate planes, it goes on to teach again and again this structure is not desirable for a plurality of reasons. Cantley teaches so strongly against having the members in offset planes,

that it actually resorts to creating a visual "illusion" of three dimensions. (col. 4, line 62.) Thus, the Cantley reference materially teaches away from the members of the lattice being offset from one another.

This is quite different from the structure claimed in amended claim 1, which calls for the following:

"at the juncture where the first and the second extensions appear to cross over each other, at least 50% to 95% of the depth of each side edge is exposed and the remaining portion of the depth of each side edge is merged with the other extension." As discussed above, Cantley clearly teaches against this structure. Additionally, nowhere does Cantley teach, suggest, or show structure for a large offset. Rather, Cantley repeatedly states an offset is problematic and not desirable. This is therefore a significant structural distinction between the Cantley reference and amended claim 1 that weighs heavily in favor of a finding of nonobviousness. As such, applicant does not believe the structure claimed in amended claim 1 is obvious in light of the Cantley reference, and as such the Cantley patent ought not be used to deny the patentability of amended claim 1.

Additionally, Cantley is the only/sole reference used to reject amended claim 1 on the grounds of obviousness. However, there must be some teaching in the prior art that suggests combining Cantley with other references leading up to the finding of obviousness and the associated obviousness based rejection. Here, however, Cantley was not combined with any other reference. It appears that the Examiner used/combined his personal knowledge with the Cantley patent to generate the 35 U.S.C. §103(a) rejection. Since that appears to be the case,

the applicant respectfully requests an affidavit (37 C.F.R. §1.104 (d)(2)) from the Examiner, that explains the grounds for the 35 U.S.C. 103(a) rejection of amended claim 1 premised on the single Cantley reference. Of course, applicant needs to know, at a minimum, the exact references Cantley was combined with and the teachings which suggested the combination, and applicant further needs to know why this combination is proper and why the combination would have been obvious.

Further, applicant respectfully disagrees with the Examiner's citation to In re Aller, 105 U.S.P.Q. 233 (CCPA 1955). The In re Aller case dealt with chemical process claims for decomposing isopropyl benzene hydroperoxide with aqueous sulphuric acid in a concentration of between 25% and 70% at temperatures between 40 and 80 degrees, and a prior art article showed the same process at 100 degrees with a 10% sulphuric acid solution. In re Aller 105 U.S.P.Q at 234. Indeed, in that case the claims were rejected because "the process of the appellants" was "identical with that of the prior art" process, but at different temperature and acid concentration. In re Aller 105 U.S.P.Q. at 234 (emphasis added). In re Aller ought not be used to deny the patentability of amended claim 1, because here the structure of amended claim 1 is not neither identical to the structure shown in Cantley, nor is it shown, taught, or suggested by Cantley. In re Aller 105 U.S.P.Q. at 234.

Hence, applicant believes amended claim 1 to be in condition for allowance, and respectfully requests the Examiner reconsider and withdraw the rejection of amended claim 1 and allow amended claim 1 and all the claims that depend therefrom.

8. Response to point 7(d) in the First Office Action

Amended claim 9 presently stands rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Pat. No. 6,286,284 to Cantley, which has been described in point 7(c). The Examiner states that "Cantley ... includes all the limitations of claim 9 as well as a method of manufacturing a the unitary polymeric lattice fence 50." Applicant respectfully disagrees because amended claim 9 calls for "at least 50% to 95% of the depth of each side edge is exposed and the remaining portion of the depth of each side edge is merged with the other extension," and nowhere does Cantley teach, suggest, or show this structure. Indeed, point 7(c(i)) in the Office Action states that Cantley does not show this structure.

With this being the case, applicant reasserts all of the arguments set forth with respect to amended claim 1 for amended claim 9 as if fully set forth herein. Also, since, it appears Cantley is the only/sole reference used to reject amended claim 9 on the grounds of obviousness, and since it appears it was not combined with any other teachings, the applicant respectfully requests an affidavit (37 C.F.R. §1.104 (d)(2)) from the Examiner explaining the grounds for the 35 U.S.C. 103(a) rejection of amended claim 9.

Thus, applicant believes amended claim 9 to be in condition for allowance, and respectfully requests the Examiner reconsider

and withdraw the rejection of this claim and allow amended claim 9.

9. Response to point 7(e) in the First Office Action

Amended claims 2 and 10 presently stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Pat. No. 6,286,284 to Cantley. Again, since Cantley appears to be the only/sole reference used for this obviousness based rejection and was not combined with any other teachings, applicant respectfully requests an affidavit (37 C.F.R. §1.104 (d) (2)) from the Examiner explaining the grounds for the 35 U.S.C. 103(a) rejection of amended claims 2 and 10 premised on the single Cantley reference and the references combined with Cantley. Applicant needs to know the references Cantley was combined with and the teachings which suggested the combination, and applicant further needs to know why this combination is proper and why the combination would have been obvious.

Additionally, the Examiner cites to In re Boesch, 617 F.2d 272, 205 U.S.P.Q. 215 (CCPA) 1980) to support the rejection of these claims on the grounds of obviousness. The In re Boesch that case dealt with nickel base alloys wherein the elements in the alloy were balanced according to a chemical equation, to provide a Nv value not in excess of 2.35 according to the chemical equation. In re Boesch at 216. The claims were rejected because the two prior art references disclosed "alloys having compositional limits overlapping those of the claimed alloys" and "each of the ranges of constituents in appellant's claimed alloys overlaps ranges disclosed by" the prior art. In re Boesch at 218. Thus, this case is inapplicable for at least two reasons; first it pertains to chemical equations/

formulations, not structure as called for in amended claims 2 and 10, and second, the prior art references showed the ranges set forth in the appellant's claims. In re Boesch at 218. That is simply not the case here, as amended claims 2 and 10 call for the exposed depth of each side edge to be "about eighty percent," and this amount of exposed depth is nowhere shown, taught, or suggested in the sole Cantley reference.

Thus, applicant believes amended claims 2 and 10 are now in condition for allowance, and respectfully requests the Examiner reconsider and withdraw the rejections of these claims and allow amended claims 2 and 10.

10. Response to points 7(f-j)) in the First Office Action

Amended claims 4-8 and 12-16 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,286,284 to Cantley.

With respect to the rejections of claims 4-8, applicant reasserts all of the above arguments set forth above pertaining to the rejection of amended claim 1. With respect to the rejection of claims 12-16, applicant reasserts all of the above arguments set forth above pertaining to amended claim 9. Again, since it appears that Cantley was the sole reference used for these obviousness based rejections and it further appears Cantley was not combined with any other references, applicant respectfully requests affidavits (37 C.F.R. §1.104 (d)(2)) from the Examiner explaining the grounds for the 35 U.S.C. 103(a) rejection of 4-12 and claims 13-16 premised on the single Cantley reference

Additionally, applicant traverses the rejection to claims 8 and 16 on additional grounds. The claims 8 and 16 recite "the

aperture is defined by a single curvilinear line." The fourth full paragraph of page 4 of the specification states that the aperture design may be "a single curvilinear line like a circle as shown in figure 4, or an ellipse." In the Office Action, the Examiner states that Cantley shows an "aperture defined by a continuous curvilinear line (see figure 6)." Applicant respectfully disagrees, because figure 6 of Cantley does not show a single curvilinear line. Rather, figure 6 of Cantley shows a rectangular aperture. The Cantley patent states the areas where members 60 intersect "the continuous members 52 are defined herein as junction regions 70." (Col. 4, 21-22). Reference number 70 merely identifies the "juncture region 70," and that is all it identifies. (Col. 4, line 61). Thus applicant respectfully request the rejections to claims 8 and 16 be withdrawn because these claims call for the structure of a curvilinear line, which is not shown in Cantley.

NOT SHOWN IN DRAWINGS

Thus, since applicant believes amended claims 1 and 9 are now in condition for allowance, applicant believes all the claims which depend therefrom (4-8 and 12-16) are in condition for allowance. Thus, applicant respectfully requests the Examiner reconsider and withdraw the rejection of claims 4-8 and 12-16 and allow these claims.

11. Claims 3 and 11 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Cantley in view of U.S. Pat. No. 5,865,427 to Cowan (hereinafter Cowan).

Cowan is for a plastic fence with reflective tape. It shows fencing that is two dimensional. Nowhere does it show three-dimensional lattice fencing.

Applicant respectfully disagrees with the Examiner's point

8(a). First, the Examiner states that Cantley discloses all the limitations of claims 3 and 11, except for the fact that the polymeric material is polyethylene. However, claims 3 and 11 depend from amended claims 1 and 9, respectively. So actually, claims 3 and 11 each call for the following structure recited in amended claims 1 and 9 "the juncture where the first and the second extensions appear to cross over each other, at least 50% to 95% of the depth of each side edge is exposed and the remaining portion of the depth of each side edge is merged with the other extension." Nowhere does Cantley disclose this structure, indeed, even in the Office Action point 7(c)(i) states "Cantley... fails to explicitly disclose that a juncture where the first and second extensions appear to cross one another, at least 50% to 90% of the depth of each side edge is exposed.." Again, since neither Cantley nor Cowan teach the above structure called for in amended claims 1 and 9 from which claims 3 and 11 depend, there are simply no references that teach or suggest the structure called for in claims 3 and 11. Applicant thus respectfully requests affidavits (37 C.F.R. §1.104 (d)(2)) from the Examiner explaining the grounds for the 35 U.S.C. 103(a) rejection claims 3 and 11 premised on the Cantley patent and the Cowan patent, which only deals with materials of construction.

For the reasons discussed above, applicant believes this structure recited in claims 3 and 11 to be nonobvious and that these claims are in condition for allowance.

Thus, applicant respectfully requests the Examiner reconsider and withdraw the rejection of claims 3 and 11 and allow these claims.

12. Claims 17-19 are new claims. Support for these new claims is found in the specification (see figure 5 and point 2(b) above). Hence, applicant does not believe the new claim 17-19 add new matter to the application. Applicant respectfully requests these claims be allowed.

13. New claim 20 calls for the network of apertures to be curvilinear apertures and this structure is not shown in the cited references, and it calls for fill. Applicant does not believe these new claims add new matter because support for these claims is found in the specification. Applicant respectfully requests new claims 20-24 be allowed.

14. Conclusion

Applicant respectfully requests that the amendments be entered, that the rejections of claims 1-16 be reconsidered and withdrawn, that these claims be allowed, and that new claims 17-24 be allowed.

Respectfully submitted,



John M. Del Vecchio
Reg. No. 42,475

Hodgson Russ LLP
One M&T Plaza, Suite 2000
Buffalo, New York 14203